COURT'S ORDER WHETHER THE CASE IS OR IS NOT APPROVED FOR REPORTING

[Chapter VIII, Rule 32 (2) (b)]

Description of Case.

A.O. No. 1504 of 2001
Old F.A.F.O.No. 654 of 1996

National Insurance Co. Ltd.
Vs.
Ali Sher and another.

A.F.R. (Approved for Reporting)
~~Not Approved for Reporting~~

(B.S. Verma, J.)

Date: 5th December 2006

Initials of Judge

Reserved Judgment

THE HIGH COURT OF UTTARANCHAL AT NAINITAL.

A.O. No. 1504 of 2001

Old F.A.F.O.No. 654 of 1996

National Insurance Company Ltd. Registered Office at 3, Middleton Street, Calcutta, through its Administrative Officer (Legal), D.Sarkar, at present posted at Divisional Office, 25 M.G.Marg, Allahabad.

… Appellant.

Versus

1. Ali Sher, son of Hamid Ullah, C/O Pal Stone Crusher Private Ltd. Haldu Chaud, Lal Kuan, Nainital. (Claimant)
2. Managing Director, M/s Pal Stone Crusher Private Ltd., Haldu Chaud, Lal Kuan, Nainital. (Opposite Party)

… Respondents

Sri Pradeep Hadiya holding brief of Sri B.K.Gupta, learned Counsel for the appellant-Insurance Company.

Date December 05, 2006.

P.C. : Hon. B.S. Verma, J.

This appeal under Section 30 of the Workmen's Compensation Act, 1923 is directed against the judgment and award dated 17-9-1996 passed by the learned Workmen's Compensation Commissioner/Dy. Labour Commissioner Kumaon Region, Haldwani (Nainital) (***for short Commissioner***) in W.C.A. No. 26 of 1995, Ali Sher Vs. M/s Pal Stone Crusher and others, whereby compensation of Rs. 1,01,349/-, interest for three years @ 6%, i.e. Rs. 20,776-54 and penalty of Rs. 15,000/-, total Rs. 1,376,125-54 was awarded in favour of the workman-respondent against the appellant-Insurance Company.

Relevant facts of the case are that the claimant-respondent Ali Sher filed a claim petition before the learned Commissioner alleging that on 23-3-1993 due to accidental injuries in the course of his employment under the M/s Pal Stone crusher, he sustained injuries with the result he became permanently incapacitated. The workman alleged his age about 19 years and income Rs. 1,000/- per month. Claim petition was preferred for compensation of Rs. 2,02,698/- against the employer and the

insurance company. The employer filed its written statement and admitted the case of the claimant on material aspect. In the additional please, it was contended that the workmen of the employer are insured with the insurance company and the information of the accident was given to the insurer, therefore, the Insurance Company is liable for the payment of compensation if any. However, it was contended that the claim petition is defective for non-joinder of insurance company.

The Insurance Company was impleaded as party and it also filed its written statement and contested the case asserting that the workman suffered no injury in the course of his employment and he was not under the employment of the employer firm. It was pleaded that the claim has been preferred on wrong facts.

The claimant filed documentary evidence. The learned Commissioner recorded the evidence led by the claimant as well as opposite parties, heard them and after perusing the evidence on record found that on the basis of the disability certificate issued by the medical authority, the claimant suffered 90% disability. It was also found that the injuries were caused to the claimant in the course of his employment. The factum of accident was admitted by the employer. Ultimately, learned Commissioner on the basis of evidence led by the parties has held that the claimant was entitled to compensation of Rs. 1,01,349, interest @ 6% for three years Rs. 20,776-54P and penalty of Rs. 15,000/-, total Rs. 1,37,125-54 payable by the Insurance Company as mentioned in the impugned order.

The main controversy to be determined in this appeal is whether the appellant could be held liable to pay the interest and the penalty to the claimant.

I have heard learned counsel for the appellant at length and perused the record. The employer-respondent no. 2 and the

claimant were sufficiently served but none come forward to argue the appeal on behalf of the respondents.

In support of the contention of the appellant, reference was made to a Division Bench judgment of the Apex Court in Writ Petition (Civil) No. 341 of 2003, **P.J.Narayan Vs. Union of India & others.** In that case, the Writ Petition was filed before the Apex Court for the purpose of directing the Insurance Company to delete the Clause in the Insurance Policy, which provided that in cases of compensation under the Workmen's Compensation Act, 1923, the Insurance Company will not be liable to pay interest. The Apex Court, after hearing the parties, observed that there is no statutory liability on the Insurance Company. The statutory liability under the Workmen's Compensation Act is on the employer and the insurance is a matter of contract between the insurance company and the insured. Their Lordships of the Apex Court further observed that it is always open to the Insurance Company to refuse to insure. Similarly, they are entitled to provide by contract that they will not take on liability for interest. In the absence of any statute to that effect, Insurance Company cannot be forced by Courts to take on liabilities, which they do not want to take. The writ petition was dismissed with the said observations. In the present case, the appellant failed to show that there is a barring clause not to pay the interest in the Insurance Policy. Relying upon the case of P.J.Narayan (supra), a Division Bench of this Court in A.O. No. 298 of 2003 United India Insurance Co. Ltd. Vs. Smt. Hema Sharma and others has also taken the view that rights and liabilities of the parties are governed by the policy of insurance and the same is contractual liability between the parties

Moreover, the Apex Court in the case of ***Ved Prakash Garg V. Premi Devi and others [AIR 1997 Supreme Court 3854]*** has dealt with the provisions of Workmen's Compensation Act, wherein it was held that ***"Liability of Insurance Company-To make good liability arising under Workmen's Compensation Act-***

Extends to payment of principal amount of compensation computed by Commissioner and interest levied under S.4-A(3)(a)- but not the penalty levied under S.4-A(3)(b).”

The liability for compensation and the interest is a contractual liability between the Insurance Company and the insured. In the present case, the appellant could not establish that there was any such provision under the Insurance Policy that the insurer shall not be liable to pay the interest, therefore, in view of the Apex Court judgment in the case of Ved Prakash Garg (supra), I hold that the appellant is only liable to pay the compensation and the interest and not the penalty. In the case of ***New India Assurance Co.Ltd. Vs. Harshdbhai Modhiya and another [III(2006)SLT 665]*** the Apex Court has referred the cases of Ved Prakash Garg (supra) and P.J. Narayan (supra) and in paragraph 15, it has been held that “*the terms of contract of insurance would depend upon the volition of the parties. A contract of insurance is governed by the provisions of the Insurance Act. ”* Since in the case at hand, the appellant could not show that there is any barring clause in the Insurance Policy that the Insurance Company shall not pay the interest, therefore, the insurer is liable to the compensation along with interest. The Insurance Company cannot be held liable to pay the penalty of Rs. 15,000/-. The amount of penalty i.e. Rs. 15,000/- shall be payable by the employer-respondent no.2. To this extent the impugned award shall stand modified.

In view of the discussion above, the appeal preferred by the Insurance Company is liable to be partly allowed. It is held that that the amount of penalty of Rs. 15,000/- shall be paid by employer-respondent no. 2 and not by the Insurance Company-appellant.

The appeal is partly allowed. The judgment and award under appeal is modified to the extent that the appellant shall not be liable to pay the penalty amount of Rs. 15,000/- to the claimant. The employer-respondent no.2 shall pay the penalty of Rs. 15,000/-, as

imposed by the learned Commissioner of the claimant-respondent no.1. Rest of the findings recorded by the Workmen's Compensation Commissioner are maintained. No order as to costs.

Since the record shows that entire amount under the impugned award had already been received by the claimant, therefore, it is provided that if the penalty amount of Rs. 15,000/- had been paid by the appellant-Insurance Company, the respondent no.2-employer shall make the payment of penalty amount to the Insurance Company forthwith.

(B.S. Verma, J.)

RCP